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No. 91-510

In the Supreme Court of the United States

OCTOBER TERM, 1991

PATSY O. TIFFANY, ADMINISTRATRIX AND PERSONAL REPRESENTATIVE FOR THE ESTATE OF HENRY H. TIFFANY, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

A civilian aircraft that had not filed a flight plan unlawfully penetrated the Air Defense Identification Zone along the eastern shore of the United States and collided with an Air Force interceptor dispatched to identify the plane. The question presented is whether a claim based upon alleged negligence in the execution of the military intercept is justiciable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 931 F.2d 271. The opinion of the district court (Pet. App. B1-B15) is reported at 726 F. Supp. 129.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1991. A petition for rehearing was denied on July 3, 1991 (Pet. App. D1-D2). The petition for a writ of certiorari was filed on September 30, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a 1983 mid-air collision between a private airplane piloted by petitioner's decedent, Henry Tiffany, and a United States F-4 jet fighter. The fighter was one of two aircraft sent by the North American Air Defense Command (NORAD) to intercept and identify Tiffany's airplane, after Tiffany unlawfully entered the Air Defense Identification Zone (ADIZ) along the Eastern shore of the United States without having filed a flight plan. Tiffany was on a flight from Nassau, Bahamas, toward North Carolina. While in Nassau, he was informed by Bahamian authorities that his original flight plan—which called for a direct flight from Nassau to Norfolk, Virginia—was impermissible because of U.S. Customs regulations requiring flights from the Caribbean to clear customs in one of several designated Florida cities. See 19 C.F.R. 6.14 (1983). Although he modified the flight plan to provide for a stop in Fort Pierce, Florida, Tiffany failed to activate the modified plan when he left Nassau and flew directly north toward North Carolina. Pet. App. A2-A3, A4.

NORAD's peacetime mission is "to detect and identify any unusual air activity within the perimeter areas of the North American Continent which might be prejudicial to the national interests, or indicate an imminent air attack against vital targets in the United States and Canada, and to restrict violations of sovereign airspace." N/A/A Regulation 55-14 ¶ 2.a (May 5, 1980). In accordance with standard procedures, when NORAD detected Tiffany's airplane and determined that it did not correspond to any filed flight plan, NORAD classified the plane as

"unknown." Two F-4 fighters took off from a base in North Carolina to intercept and identify Tiffany's plane. Visibility was limited at the altitude at which petitioner's decedent was flying. Pet. App. A5.

In violation of regulations requiring him to contact Federal Aviation Administration air traffic controllers before he entered the ADIZ, Tiffany failed to establish radio contact with the FAA until, by his estimate, he was 50 miles off the North Carolina coast. After first misstating his position, Tiffany advised FAA controllers that he was 56 miles from Wilmington, North Carolina, and provided the make and model of his aircraft. A few minutes later, the FAA advised NORAD that it had identified Tiffany by radar. The status of Tiffany's aircraft was changed from "unknown" to "friendly"; NORAD's control officer decided to terminate the intercept; and that decision was relayed to the interceptor aircraft. Pet. App. A4-A6.

A few seconds later, one of the interceptors collided with Tiffany's plane while in the process of breaking off the intercept. Tiffany's plane fell into the Atlantic Ocean, killing all on board. The F-4 suffered damage to its wing, but was able to return to its home base. Pet. App. A6.

2. Petitioner commenced this action against the United States under the Death on the High Seas Act, 46 U.S.C. App. 761-768. After a trial, the district court found that the proximate cause of the crash was negligence on the part of NORAD's ground control personnel and the crew of the interceptor aircraft. The court found fault with various aspects of the mission—including the failure to terminate the intercept on the basis of information the court deemed to be "sufficient," the continuation of "a mission designed for a visual identification in weather effectively pre-

cluding such an identification," and actions by the interceptor pilot that the court found to be inconsistent with "benchmarks of the prudent intercept." Pet. App. B7-B8.[1] The court also rejected the government's contention that the proximate cause of the accident was Tiffany's decision to enter an ADIZ without an activated flight plan, in knowing violation of federal regulations, thus triggering a NORAD intercept. *Ibid.*

3. The court of appeals reversed the judgment and remanded with a direction to dismiss the case. Pet. App. A1-A21. Finding that petitioner's lawsuit "necessarily calls into question the government's most important procedures and plans for the defense of the country," the court concluded that her claims are nonjusticiable. *Id.* at A8. "If we were to hold that the United States acted negligently in conducting the defense of its eastern border," the court explained, "we would be interjecting tort law into the realm of national security and second-guessing judgments with respect to potentially hostile aircraft that are properly left to the other constituent branches of government." *Ibid.*

The court acknowledged at the outset that the Suits in Admiralty Act, 46 U.S.C. App. 741-752, waives sovereign immunity for DOHSA actions against the United States, but it noted that petitioner's claims were nonjusticiable nonetheless if

[1] The district court also found that the military was negligent in failing to recalibrate the interceptors' altimeters. Pet. App. B4, B7. The evidence was undisputed, however, that the F-4 that collided with Tiffany's aircraft had established its position relative to Tiffany's plane with onboard radar and had not relied on its absolute altitude vis-a-vis the ground. Thus, any error in the reading on the altimeter could not have contributed to the accident. See Gov't C.A. Reply Br. 30.

their resolution required the judiciary "to move outside the customary areas of judicial competence or if other 'prudential considerations counsel against judicial intervention.'" Pet. App. A9 (quoting *Goldwater* v. *Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring)). The court observed that the discretionary function exception set forth in the Federal Tort Claims Act and implicit in the Suits in Admiralty Act addresses those constitutional concerns and thus "inform[ed]" the court's analysis, but it also found that "the discretionary function exception alone does not capture all the important aspects of this case." Pet. App. A9-A11. Accordingly, the court went on to analyze the justiciability of the case without applying the discretionary function exception as such.

The court began that analysis by emphasizing that this case "implicates a discretionary decision of the most serious sort"—"a civilian injury that followed from actions taken in actual military defense of our country." Pet. App. A11. After reviewing authorities recognizing the predominant role that the Legislative and Executive Branches play with respect to military matters, the court held "that Tiffany cannot reshape the national response to threats of hostile air attack through the mechanism of tort law." *Id.* at A13. Because "[t]he executive and legislative branches have accorded NORAD the authority and the substantial responsibility of protecting the nation's borders," the court explained, NORAD "must weigh the necessity of precise identification against the resulting risks to its own pilots' safety and it must balance the need to protect the civilian population on the ground with the need to protect civilian aircraft which enter into air defense zones without filing flight plans." *Id.* at A14.

The court found that "[s]uch delicate appraisals of relative dangers were not ultimately consigned by Congress to the courts." Pet. App. A14. "Judges have no 'judicially discoverable and manageable standards for resolving' whether necessities of national defense outweigh risks to civilian aircraft," the court explained, and the judiciary cannot "even 'undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government.' " *Ibid.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)).

The court rejected petitioner's contention that the court could properly decide the case by "inquir[ing] into whether government agents followed" NORAD and Air Force regulations, manuals, and procedures. Pet. App. A15. The court cited three reasons for that conclusion (*ibid.*):

> First, the mere fact that NORAD established routine operating procedures cannot convert this dispute into a justiciable issue when so many other factors counsel against judicial intervention. Second, we do not believe that each NORAD or Air Force regulation that designates internal operating procedures automatically gives rise to an actionable duty in tort to comply with them. Third, an examination of the regulations in question reveals that they actually reserve a great deal of discretion for the parties who must conduct the defensive maneuvers.

The court concluded, accordingly, that "the presence of NORAD regulations which speak to intercept procedures does not change [the] analysis." *Id.* at A20.[2]

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[2] The court did not reach other grounds on which the government had sought reversal of the judgment or reduction of the award of damages in petitioner's favor. Those grounds were (1) that Tiffany knowingly assumed the risk of hazardous

ARGUMENT

This case involves a highly unusual tort claim, in which a citizen seeks damages from the United States based on "actions taken in actual military defense of our country." Pet. App. A11. The court of appeals was justified in its conclusion that the performance of such a quintessentially military mission is not properly subject to judicial review. That determination is consistent with decisions of this Court and of other courts of appeals. Further review is therefore not warranted.

1. In her zeal to obtain further review, petitioner repeatedly overstates the scope of the court of appeals' holding. We are told, for instance, that the court of appeals has "abandoned the discretionary function test altogether," that its decision "extends the doctrine of nonjusticiability far beyond its previous boundaries," that the court's reasoning renders a case nonjusticiable whenever it "can be said to somehow involve considerations of 'national security' or 'national defense,' " and that the court has held "that the Government may not be sued for operational negligence involving national security." Pet. 7, 10, 14.

There is no merit to this hyperbole. Throughout its opinion, the court of appeals was careful to stress the singular nature of this case—and, correspondingly, the limited nature of its holding. The court stressed

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operations by entering the ADIZ without an effective flight plan; (2) that the district court erred, as a matter of law, in its analysis of the proximate cause of the accident; and (3) that, in calculating damages, the district court erred in concluding that a bar complaint against Tiffany, citing his confession that he had previously engaged in drug smuggling, would have led to his disbarment and reduced his future income. Gov't C.A. Br. 28-48. Those issues would remain to be resolved if the court of appeals' judgment were reversed.

at the outset that this case involves "actions taken in actual military defense of our country." Pet. App. A11. Under its reasoning, the court was also careful to note, "[t]he military does not enjoy a blanket exemption from the need to proceed in a non-negligent manner" and might be subject to different restrictions when "conducting training exercises * * * or acting in a civilian arena." Pet. App. A16. The court specifically reserved the question whether its decision would reach a case in which a civilian pilot had properly filed and activated a flight plan. All of those situations, the court explained, present "different circumstances from ones where actual military force was initiated to investigate a potentially hostile aircraft." *Ibid.*

In short, the court's holding was limited to the unusual facts of this case, the adjudication of which entails an exceptional intrusion into military matters. The fact that the question presented by this case is unlikely to recur with any frequency is itself a sufficient basis for denying the petition.

2. The court of appeals' decision was well founded. This Court has often recognized that the judiciary should be particularly reluctant to review the propriety of military operations. *E.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 788-789 (1950); *Gilligan* v. *Morgan*, 413 U.S. 1, 5-12 (1973). The Constitution expressly authorizes Congress to declare war and to raise and support armies, as well as to exercise other related powers (U.S. Const. Art. I, § 8, Cls. 11-16), and reserves to the President, as Commander in Chief, the power to direct military affairs (U.S. Const. Art. II, § 2, Cl. 1). Furthermore, the judiciary is not well equipped to assess the propriety of military operations. As this Court observed in *Gilligan* v. *Morgan*, 413 U.S. at 10:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Under the facts of this case, these considerations support the court of appeals' conclusion that petitioner's claim is nonjusticiable. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department * * * or a lack of judicially discoverable and manageable standards for resolving it." *Baker* v. *Carr*, 369 U.S. at 217. Adjudication of this case would also express a "lack of the respect due coordinate branches of government." *Ibid.*

It is true, of course, that "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." *Laird* v. *Tatum*, 408 U.S. 1, 15-16 (1972). But this case is not fairly regarded as a case of military intrusion into the civilian sector. To the contrary, by entering an ADIZ after knowingly failing to give the notice (filing of a flight plan) that would have made clear his civilian status, Tiffany presented himself to air defense authorities as a potential military threat.

As a result, the adjudication of this case necessarily entails judicial review, by means of the application

of tort law, of operations that must account for the possibility that an unidentified aircraft may be hostile. As the court of appeals recognized, in assessing the reasonableness of those matters, a court reviews quintessentially military judgments. It is wholly unpersuasive to suggest, as petitioner does (Pet. 12 n.12), that such review is indistinguishable from the adjudication of a car crash case.

In this case, for instance, the district court based its finding of liability on, among other things, its determinations that NORAD "had sufficient information, within ample time, to have terminated the intercept" and that the interceptor "continued a mission designed for a visual identification in weather effectively precluding such an identification." Pet. App. B7-B8. There is no difference, in principle, between such a determination and its converse—a ruling that the military was negligent, and thus liable, in a case in which it terminated an intercept on insufficient grounds and allowed a hostile aircraft to reach the American mainland. See *Zuckerbraun* v. *General Dynamics Corp.*, 755 F. Supp. 1134, 1140-1142 (D. Conn. 1990) (holding that claims arising out of the failure to shoot down Iraqi fighters that attacked the U.S.S. Stark were nonjusticiable), aff'd, 935 F.2d 544 (2d Cir. 1991). Plainly, courts should not second-guess the military in this area, by employing tort law principles to determine whether servicemen engaged in the Nation's defense acted in accordance with a court's conception of the "prudent intercept" (Pet. App. A14).

Contrary to petitioner's contention (Pet. 9-10), this Court has never suggested that a suit is justiciable unless it challenges "military policy and planning" or

involves an injured serviceman.[3] Consequently, the lower courts have consistently declined to adjudicate those few cases, involving injuries to civilians, in which military operations have been called into question. *Nejad* v. *United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (dismissing claims arising from the downing of an Iranian airliner by the U.S.S. Vincennes); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 613, 616 (D.D.C. 1984) (refusing to adjudicate allegations that the military deployed military aircraft in a manner that increased the risk that the Soviet Union would misidentify Flight KAL 007); *Rappenecker* v. *United States*, 509 F. Supp. 1024 (N.D. Cal. 1980) (dismissing as nonjusticiable claims based on the Cambodian seizure of the S.S. Mayaguez and the United States' military response to that seizure).[4] *Rappenecker* and *Nejad* specifically rejected the notion that the political question doctrine is limited to matters of policy, as opposed to military operations.[5]

[3] The Court has not had occasion to consider a case with facts similar to those of this case. Such cases have been very rare, and this Court's review is ordinarily reserved for cases presenting questions of recurrent importance. There is no merit to petitioner's attempt (see Pet. 9-10) to derive from the facts of the cases this Court has decided a rule that the political question doctrine is limited to issues of "military policy and planning."

[4] These cases were not, as petitioner suggests (Pet. 10 n.9), limited to challenges to military policy. *Rappenecker* did hold that the allegedly negligent failure of the government to issue warnings to merchant ships regarding possible actions by the Cambodian government was actionable. See 509 F. Supp. at 1030. That claim, however, did not involve any review of military operations.

[5] In *Nejad*, the court explained:

3. There is no conflict between the court of appeals' decision and the decisions of any other court of appeals. With one exception, all of the cases on which petitioner relies (Pet. 14-16) involved training missions. See *Peterson* v. *United States*, 673 F.2d 237, 240 (8th Cir. 1982); *Ward* v. *United States*, 471 F.2d 667, 670 (3d Cir. 1973); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 393-394 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964).[6] The court of appeals in this case expressly distinguished those cases, explaining that "[w]hen conducting training exercises, * * * national defense interests may be more

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> Plaintiffs contend that they do not call into question the President's decision to send U.S. warships to the Persian Gulf, but only the negligent manner in which the President's decision was carried out. This contention too must fail.
>
> > [T]he same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates. The textual commitment to the President as commander in chief of authority for military decisions entails that his decision may be implemented without judicial scrutiny. Moreover, courts lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life.
>
> 724 F. Supp. at 755 (quoting *Rappenecker*, 509 F. Supp. at 1030).

[6] The one exception, *Downs* v. *United States*, 522 F.2d 990, 995-997 (6th Cir. 1975), is even farther afield. In that case, the court held that allegedly negligent actions by FBI agents responding to an aircraft hijacking were not within the discretionary function exception. The court did not address the issue of justiciability. Moreover, it relied heavily on the tradition of judicial scrutiny of "the day-to-day activities of law enforcement officers," *id.* at 997-998, a consideration totally absent from the instant case.

remote and the military faces different restrictions." Pet. App. A16. Furthermore, the decisions on which petitioner relies addressed only the availability of the discretionary function exception.[7] There is no reason to believe that the courts that issued them would hold, contrary to the court of appeals here, that claims arising out of "actions taken in actual military defense of our country" (Pet. App. A11) are justiciable.

4. Nor does the court of appeals' decision conflict with this Court's decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). See Pet. 7-8. The only issue in *Boyle* was the extent to which federal interests preempted the application of state products liability law to equipment purchased from defense contractors. In resolving that question, the Court refused to define the area of preemption by reference to the *Feres* doctrine,[8] choosing instead to incorporate the boundaries of the discretionary function exception. The Court did not "reject[] the separation of powers doctrine as a foundation for analysis of torts involving civilians" (Pet. 8). In fact, the Court's decision not to follow *Feres* was based in part on the fact that that approach would be too narrow as applied to civilian injuries. 487 U.S. at 510-511.

In any event, *Boyle* did not address the question presented by this case, which is the extent of the

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[7] To the extent that those decisions draw a strict distinction between policy and operations, they have been overruled by *United States* v. *Gaubert*, 111 S. Ct. 1267, 1275 (1991). In *Gaubert*, this Court rejected the proposition that the discretionary function exception "refers exclusively to the policy-making or planning functions" and refused to recognize the "nonexistent dichotomy between discretionary functions and operational activities."

[8] See *Feres* v. *United States*, 340 U.S. 135 (1950).

judiciary's authority to adjudicate cases involving military matters. While *Feres*, the discretionary function exception, and the political question doctrine have similar roots, they are legally distinct.

5. As petitioner acknowledges (*e.g.*, Pet. 7), the court of appeals did not hold that the discretionary function exception dictated a judgment in the government's favor. The court made clear that although the discretionary function exception "inform[ed]" its inquiry, its decision rested on different grounds. Pet. App. A11. Consequently, there is no merit to petitioner's contention (Pet. 11-14) that further review is warranted to clarify the application of the discretionary function exception.

Moreover, petitioner's reliance on *Berkovitz* v. *United States*, 486 U.S. 531 (1988), embodies a fundamental misconception regarding the role that a statute or regulation may play in a tort action against the United States. *Berkovitz* held that the government may not invoke the discretionary function exception "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* at 536. In holding that this FTCA exception is unavailable, however, the Court did not adopt the more radical proposition advanced by petitioner here—that the United States is *liable* for any violation of a regulation. See Pet. 13 (suggesting that court of appeals' refusal to accept petitioner's "assumption that NORAD regulations automatically create an actionable duty in tort toward civilians" was "in direct contravention of this Court's holdings in *Gaubert* and *Berkovitz*").

The court of appeals correctly understood, therefore, that the existence of written procedures for intercepts of unknown aircraft would not alleviate the difficulties inherent in judicial review of this case. A

court intrudes on military judgments when it determines which, if any, military directives give rise to tort duties in favor of potential plaintiffs or applies the general standard of due care in an area in which there are such regulations. Further, as the court of appeals recognized, some of the regulations on which petitioner has relied preserve substantial areas of judgment for those called upon to act on them. Pet. App. A19-A20.

Petitioner's reliance on the FTCA exception for "combatant activities * * * during time of war" (28 U.S.C. 2680(j)) is also misplaced. The court of appeals did not suggest that the Federal Tort Claims Act forecloses petitioner's action; therefore, the fact that the exception for combatant activities would not encompass petitioner's claims, a point going to the proper interpretation of that statute, is irrelevant here. The fact that Congress saw fit expressly to exclude claims involving combatant activities from the FTCA's waiver of sovereign immunity simply does not suggest that it considered all other claims involving the military to be justiciable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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